

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BETTY RUCKER, and others,  
Plaintiffs,

vs.

SPOKANE COUNTY, a municipal  
corporation,  
Defendant.

No. CV-12-5157-LRS

**ORDER RE  
MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT**

**BEFORE THE COURT** are the Defendant's Motion For Partial Summary Judgment (ECF No. 14) and the Plaintiffs' Cross-Motion For Partial Summary Judgment (ECF No. 18). These motions were heard with oral argument on November 14, 2013. Andrew S. Biviano, Esq., argued for Plaintiffs. Michael T. Kitson, Esq., argued for Defendant.

**I. BACKGROUND**

This is a 42 U.S.C. §1983 class action. Plaintiff, Betty Rucker, asserts her federal 5<sup>th</sup> and 14<sup>th</sup> Amendment due process rights, and the rights of similarly situated class members, were violated by Defendant Spokane County when they were incarcerated for failing to pay legal financial obligations without a judicial inquiry regarding the reasons for their failure to pay. Furthermore, Plaintiff asserts that written waivers of such a hearing executed by her and others similarly situated were not executed knowingly, intelligently and voluntarily.

**ORDER RE MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT- 1**

1           Once an offender is no longer in the custody or under the supervision of the  
2 Washington Department of Corrections (DOC), county court clerks are statutorily  
3 empowered to enter into stipulated agreements regarding sanctions for violations  
4 of Legal Financial Obligations (LFOs) imposed by a court as part of a criminal  
5 sentence (i.e., a fine and/or restitution and/or reimbursement for court costs).  
6 RCW 9.94B.040(3)(a)(i). A clerk's office has a broad range of sanctions which  
7 it may impose, including jail time. These stipulated agreements are in the form of  
8 an "Order Enforcing Sentence-LFO" (OES) and are subject to judicial approval.  
9 RCW 9.94B.040(1). Each and every stipulated agreement must be submitted to  
10 the court and the prosecuting attorney, and must outline the violation or violations  
11 and the sanctions imposed. RCW 9.94B.040(3)(a)(ii). The court has the power  
12 to accept the agreement as written, or hold a hearing and modify the sanctions  
13 imposed, in which case the offender may withdraw from the stipulated agreement.  
14 *Id.* If an offender fails to comply with a stipulated agreement after judicial  
15 acceptance, the court may take action regarding the original non-compliance and  
16 may sanction non-compliance with the stipulated agreement as an additional  
17 violation. RCW 9.94B.040(3)(a)(iii).

18           Plaintiff was incarcerated by Defendant for failure to pay LFOs on five  
19 separate occasions in 2006, 2007, 2008, 2011 and 2013. On each of those  
20 occasions, Plaintiff was sentenced to jail pursuant to a stipulated OES. (ECF Nos.  
21 16-6, 16-7, 16-8, 16-10 and 16-11). These orders were presented to her by the  
22 Spokane County Clerk while she was in custody. Each stipulated order included  
23 a finding that Plaintiff had willfully failed to pay financial obligations "as  
24 directed."

25           On each occasion that Plaintiff was sentenced to jail, a hearing was not  
26 conducted in which a court inquired into and made findings whether Plaintiff had

27 **ORDER RE MOTIONS FOR**  
28 **PARTIAL SUMMARY JUDGMENT- 2**

1 the ability to pay her LFOs, whether she had made bona fide efforts to acquire the  
2 resources to pay, and, if necessary, whether alternative measures other than  
3 imprisonment were appropriate.

4 On the first four occasions, Plaintiff signed the OES beneath a statement  
5 that purported to be a waiver of her right to a hearing and her right to an attorney.  
6 It reads as follows:

7 I have the right to be brought before the Court for a hearing,  
8 and to have an attorney present to represent me, and that the  
9 Court will appoint an attorney to represent me if I cannot afford  
10 one[.] [B]y my signature below[,] I hereby waive my right to an  
11 attorney and having read the above modification(s) and having  
12 agreed to the punishment imposed, agree to the entry of this order.

13 Plaintiff signed the 2006, 2007, 2008 and 2011 orders “pro se.” Plaintiff  
14 was represented by the county public defender’s office when she signed the 2011  
15 order, and the same was true when she signed the 2013 order. Plaintiff was  
16 incarcerated pursuant to the 2013 order, although this order, unlike the others, did  
17 not include a purported waiver of rights.

18 On each of the stipulated orders, a “Court Collection Deputy” affixed  
19 his/her signature below the Plaintiff’s signature indicating he/she had “advised the  
20 defendant of a right to a hearing, the right to have a lawyer at the hearing, the right  
21 to have a lawyer appointed at public expense if the defendant cannot afford a  
22 lawyer” and that he “witnessed the defendant affix his/her signature above after  
23 being advised of his/her rights.”

24 Each of the stipulated orders was then subsequently submitted to a judge for  
25 approval as indicated by his/her signature on the order. Each of the stipulated  
26 orders also bears the signature of a deputy prosecuting attorney.

27 The singular issue presented by the parties’ cross-motions for summary  
28 judgment is whether the Plaintiff and others like her can waive their rights to a a

1 LFO hearing in which a court inquires into and makes findings whether the  
2 offender has the ability to pay the LFOs.

3 Defendant acknowledges that “[c]onvicted criminal defendants have a  
4 constitutional due process right to a hearing where the court inquires into the  
5 defendant’s ability to pay a [LFO] prior to being imprisoned for failing to make  
6 payments.” Defendant asserts, however, that “[c]ase law, common sense, and  
7 fundamental fairness dictate that the right to an LFO hearing, like virtually all  
8 rights whether Constitutional or not, can be knowingly, intelligently, and  
9 voluntarily waived.”

10 On the other hand, Plaintiff asks the court to hold “that parties cannot waive  
11 a court’s constitutional duty to inquire into an offender’s ability to pay legal  
12 financial obligations prior to imposing sanctions for non-payment” and that “the  
13 County has violated the Fourteenth Amendment by incarcerating Plaintiff for  
14 failure to pay legal financial obligations without inquiring into, and making  
15 findings on her, ability to pay.”

## 16 17 **II. DISCUSSION**

18 Over 30 years ago, in *Bearden v. Georgia*, 461 U.S. 660, 672, 103 S.Ct.  
19 2064 (1983), the United States Supreme Court held:

20 In [probation] revocation proceedings for failure to pay  
21 a fine or restitution, a sentencing court must inquire into  
22 the reasons for the failure to pay. If the probationer  
23 willfully refused to pay or failed to make sufficient  
24 bona fide efforts legally to acquire the resources to pay,  
25 the court may revoke probation and sentence the defendant  
26 to imprisonment within the authorized range of its  
sentencing authority. If the probationer could not pay  
despite sufficient bona fide efforts to acquire the resources  
to do so, the court must consider alternate measures of  
punishment other than imprisonment. Only if alternate  
measures are not adequate to meet the State’s interest  
in punishment and deterrence may the court imprison

27 **ORDER RE MOTIONS FOR**  
28 **PARTIAL SUMMARY JUDGMENT- 4**

1 a probationer who has made sufficient bona fide efforts  
2 to pay. To do otherwise would deprive the probationer  
3 of his conditional freedom simply because, through no  
4 fault of his own, he cannot pay the fine. Such a  
deprivation would be contrary to the fundamental fairness  
required by the Fourteenth Amendment.

5 Since then, no court has directly confronted the issue of whether the  
6 *Bearden* inquiry can be waived. No court has explicitly held the inquiry cannot  
7 be waived. Nor has this court found any case implicitly suggesting it cannot be  
8 waived, including *State v. Nason*, 166 Wn.2d 936, 233 P.3d 848 (2010), as  
9 discussed below. On the other hand, the court has found at least two cases  
10 suggesting it can be waived under the proper circumstances.

11 In *De Luna v. Hidalgo County, Texas*, 853 F.Supp.2d 623 (S.D. Tex. 2012),  
12 two students, on behalf of themselves and a purported class, brought a 42 U.S.C.  
13 §1983 action against state court magistrates and Hidalgo County alleging violation  
14 of federal due process and equal protection rights because of their placement in  
15 jail for unpaid fines or costs related to violations of the Texas Education Code.  
16 The federal district court held there was a violation of due process because of the  
17 county's policy of jailing individuals with fine-only misdemeanor offenses who  
18 failed to directly inform the arraigning magistrate of their indigency. According  
19 to the court, "the absence of any inquiry into a defendant's indigency unless the  
20 defendant 'raises' it of his or her own accord does not provide the process due."  
21 *Id.* at 648. Based on its review of Fifth Circuit and Supreme Court precedent,  
22 including *Bearden*, the district court concluded it is not necessary for a defendant  
23 to affirmatively raise his/her indigency in order to trigger the court's obligation  
24 to inquire into indigency before ordering a defendant jailed for nonpayment. The  
25 district court found that "[t]he process in place in Hidalgo County clearly risks  
26 that the defendants who do not think to 'speak up' during arraignment about their

1 inability to pay fines may be jailed solely by reason of their indigency, which the  
 2 Constitution clearly prohibits.” *Id.* Instead “[d]ue process requires a forum in  
 3 which defendants’ reasons for failing to pay are considered before committing  
 4 them to jail.” *Id.*

5 Nevertheless, the defendants in *De Luna* argued the county’s policy did not  
 6 violate the named plaintiffs’ constitutional rights because the plaintiffs had waived  
 7 their right to an indigency determination by waiving the rights of which they were  
 8 informed and pleading guilty to the offense. Rather than holding a waiver was  
 9 absolutely precluded, the court concluded the evidence of record showed there had  
 10 been no effective waiver:

11 [N]either De Luna nor Diaz can be held to have ‘waived’  
 12 his or her right to an affirmative indigency determination  
 13 by waiving the right to counsel at arraignment. Generally  
 14 speaking, to be enforceable, a waiver of constitutional  
 15 rights must be ‘voluntary, knowing, and intelligently  
 16 made,’ or ‘an intentional relinquishment or abandonment  
 17 of a known right or privilege.’” *D.H. Overmyer Co. v.*  
 18 *Frick Co.*, 405 U.S. 174, 185-86, 92 S.Ct. 775, 31 L.Ed.2d  
 19 (1972) (internal quotations and citations omitted). “[A]  
 20 waiver of constitutional rights in any context must, at the very  
 21 least, be clear.” *Fuentes v. Shevin*, 407 U.S. 67, 95, 92  
 22 S.Ct. 1983 (1972). The Court cannot accept that either  
 23 Plaintiff’s waiver of various constitutional rights of which they  
 24 were explicitly informed constitutes a waiver of their right  
 25 to a process in which the reasons for their inability to pay  
 26 would be considered.

19 *Id.* at 649.<sup>1</sup>

20 *Boyd v. Murphy*, 2008 WL 2486025 (E.D. Mo. 2008), involved a 28 U.S.C.

---

22 <sup>1</sup> *De Luna* bears some similarity to *State v. Stone*, 165 Wn.App. 796, 268  
 23 P.3d 226 (2012), where the defendant executed a general waiver of rights,  
 24 including his right to an attorney, but the waiver did not address his right to an  
 25 LFO hearing at which there would be judicial inquiry into the reason for his  
 26 failure to pay.

1 §2254 habeas petition filed by a state prisoner who asserted the sentencing court  
2 violated his Due Process and Equal Protection rights by revoking his probation  
3 due to his indigence and his inability to pay restitution, notwithstanding the  
4 existence of alternatives presented to the court. The court denied the petition,  
5 finding the Petitioner had waived the *Bearden* requirements:

6 The court concludes that although the record does not  
7 reflect compliance by the sentencing court of the *Bearden*  
8 requirements, habeas relief must nonetheless be denied  
9 in this case because it is reasonable to find that Petitioner  
10 waived any claim to the very rights he now claims were  
11 violated. Just as a criminal defendant may waive  
12 constitutional rights when pleading guilty [citation omitted],  
13 a probationer may waive the elements of due process owed  
14 to him at a probation revocation hearing and may waive  
15 the hearing altogether. [Citation omitted].

16 *Id.* at \*5.

17 Constitutional rights are presumptively waivable. *United States v.*  
18 *Mezzanatto*, 513 U.S. 196, 200-01, 115 S.Ct. 797 (1995); *States v. Humphries*,  
19 170 Wn.App. 777, 789, 285 P.3d 917 (2012). This court concludes the Supreme  
20 Court in *Bearden* did not foreclose the possibility that a defendant could  
21 effectively waive his constitutional right to have a court inquire into the reasons  
22 for his failure to pay a legal financial obligation. The court agrees with Defendant  
23 that *Bearden* is simply an extension of the due process rights the Supreme Court  
24 earlier enunciated in *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), and  
25 *Gagon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973), with regard to parole and  
26 probation revocation proceedings. Those rights- the right to a preliminary hearing  
27 to establish probable cause and a final hearing to determine whether there has  
28 been a violation- are waivable as explicitly recognized in Fed. R. Crim. P. 32.1,  
“Revoking or Modifying Probation or Supervised Release.” 32.1(b)(1)(A) states  
“[t]he person may waive the [preliminary] hearing.” 32.1(b)(2) states that

**ORDER RE MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT- 7**



1 “[u]nless waived by the person, the court must hold the [final] revocation hearing  
2 within a reasonable time in the district having jurisdiction.” This court does not  
3 believe the fact an alleged violation involves the failure to pay a legal financial  
4 obligation precludes an individual from effectively waiving his right to either a  
5 preliminary or a final revocation hearing. Absent an effective waiver, however,  
6 the court is obliged- has a duty- to hold those hearings and, where the alleged  
7 violation involves a failure to pay a legal financial obligation, must inquire into  
8 the reasons for the failure to pay. The constitutional right to this inquiry gives rise  
9 to the court’s duty to make the inquiry. The duty does not exist independently of  
10 the right, however. Therefore, if the right is knowingly, intelligently and  
11 voluntarily waived, the court is not obliged to make the inquiry. Nevertheless, the  
12 court has a duty in the first instance to ensure a waiver is knowing, intelligent and  
13 voluntary.<sup>2</sup>

14 While the court will not go as far as Defendant in asserting that *State v.*  
15 *Nason* indicates a *Bearden* inquiry can be waived via the stipulated agreements  
16 authorized under Washington law, the court agrees that *Nason* does not suggest  
17 a *Bearden* inquiry can never be waived. At issue in *Nason* was an “auto-jail”

18 ///

19 ///

---

21 <sup>2</sup> For example, in criminal cases, the preferred procedure to insure that a  
22 waiver of the right to counsel is knowingly and intelligently made is for the  
23 court to conduct a hearing to determine if the defendant has an understanding  
24 of the nature of the charges against him, the possible penalties, and the dangers  
25 and disadvantages of self-representation. *United States v. Lorenzo*, 995 F.2d  
26 1448, 1457 (9<sup>th</sup> Cir.), *cert. denied*, 510 U.S. 881, 114 S.Ct. 225 (1993).



1 provision in a court order. This is not an issue in the captioned case.<sup>3</sup> It is well  
2 settled after *Nason* that “auto-jail” provisions violate due process. In *Nason*, the  
3 auto jail provision stated: “The defendant shall pay \$25 or more monthly,  
4 effective 8-15-06. The case is to be reviewed 1/10/07 for compliance. If the  
5 defendant has not complied with the payment schedule, nor filed a motion with the  
6 court for a stay by the review date, the defendant is to report to jail on 1/17/07 by  
7 4:00 p.m. to serve 60 days in jail.” The Washington Supreme Court held this  
8 violated due process: “Because due process requires the court to inquire into  
9 Nason's reason for nonpayment, and because the inquiry must come at the time of  
10 the collection action or sanction, ordering Nason to report to jail **without a**  
11 **contemporaneous inquiry** into his ability to pay violated due process.” 168  
12 Wn.2d at 936, 945-46. (Emphasis added). The “auto-jail” provision amounted to  
13 a waiver of a future determination of Nason's ability to pay. This was

14 ///

15 ///

16 ///

17 ///

18 ///

19 \_\_\_\_\_  
20 <sup>3</sup> The jail time at issue here is not that which the Plaintiff served pursuant to  
21 the “auto-jail” provisions contained in the agreed orders prior to July 30, 2009.  
22 In *State v. Nason*, 168 Wn.2d 936, 233 P.3d 848 (2010), the Washington  
23 Supreme Court deemed such provisions to be in violation of due process  
24 because jail time was imposed based on a hearing that had occurred months  
25 earlier.

26  
27 **ORDER RE MOTIONS FOR**  
28 **PARTIAL SUMMARY JUDGMENT- 9**

1 impermissible.<sup>4</sup> The issue with regard to Ms. Rucker is whether through a  
2 stipulated order she could waive a "contemporaneous inquiry" into, and a present  
3 determination of, her financial ability to pay, and if so, what was necessary to  
4 accomplish that waiver. *Nason* does not answer these questions and does not hold  
5 that a *Bearden* inquiry can never be waived.

6 This court holds that it is possible for a criminal defendant to knowingly,  
7 intelligently and voluntarily waive a contemporaneous inquiry into whether he or  
8 she has the financial ability to pay an LFO, and to stipulate to a finding that his or  
9 her failure to pay is willful instead of the result of indigence. As *Bearden*  
10 recognizes, the government has a valid penological interest in incarcerating  
11 individuals who willfully refuse to pay their LFOs or fail to make sufficient bona  
12 fide efforts legally to acquire the resources to pay. If a defendant knowingly,  
13 intelligently and voluntarily stipulates that his or her failure to pay is willful, there  
14 is no need for the court to make specific findings regarding his or her indigence,  
15 whether he or she has made bona fide efforts to acquire the resources to pay, or  
16 whether alternative measures to imprisonment are available.

17 The critical issue is what process is required to knowingly, intelligently and  
18 voluntarily waive a *Bearden* inquiry and whether the process afforded to Ms.  
19 Rucker and others in that regard was adequate to insure their waivers were truly  
20

---

21 <sup>4</sup> See also *Stephens v. State*, 630 So.2d 1090, 1091 (Fla. 1994), where the  
22 Florida Supreme Court held that a probationer could not be imprisoned for  
23 failing to pay court-imposed restitution without the court first determining that  
24 the probationer had the ability to pay but willfully refused to do so, even if the  
25 probationer previously agreed to waive a future determination of his ability to  
26 pay.

1 knowing, intelligent and voluntary. A court has a clear duty to insure that those  
2 who appear before it and indicate they wish to waive constitutional rights do so  
3 knowingly, intelligently and voluntarily. This is the issue to which the parties and  
4 the court will now turn their attention in this litigation.

### 5 6 **III. CONCLUSION**

7 For the reasons set forth above, the Defendant's Motion For Partial  
8 Summary Judgment (ECF No. 14) is **GRANTED** and the Plaintiffs' Cross-Motion  
9 For Partial Summary Judgment (ECF No. 18) is **DENIED**. This court holds as a  
10 matter of law that the right to a contemporaneous *Bearden* hearing prior to  
11 incarceration for LFO violations may be waived.

12 **IT IS SO ORDERED.** The District Executive shall forward a copy of this  
13 order to counsel of record.

14 **DATED** this 25th of November, 2013.

15  
16 *s/Lonny R. Suko*

17 

---

LONNY R. SUKO  
18 Senior United States District Judge